BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT GREG HALL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,015,228
PENNY CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 15, 2004 preliminary hearing Order of Administrative Law Judge Brad E. Avery. Claimant was granted benefits in the form of medical treatment with Lynn Ketchum, M.D. Respondent contends that claimant suffered an intervening injury while performing work for employers subsequent to his term of employment with respondent. Respondent acknowledges that claimant suffered an accidental injury arising out of and in the course of his employment on March 25, 2003, and through a series of accidents, but contends that after claimant left respondent's employment, he obtained employment with companies performing identical work and that claimant's condition was aggravated by those later employments.

ISSUES

The issues before the Appeals Board (Board) in this appeal are:

(1) Does the Board have jurisdiction to review the preliminary hearing Order to determine if claimant's present need for medical treatment is due to the March 25, 2003 injury and a series of accidents while employed with respondent or the result of subsequent injuries suffered with different employers?

(2) Did claimant suffer an intervening injury which would preclude the awarding of medical benefits against respondent in this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked as a concrete finisher for respondent when, on March 25, 2003, while jumping off of a truck, he caught his ring on the side of the truck and his ring finger on his left hand was pulled off of the hand. Claimant was provided immediate medical treatment, which included an amputation of the left ring finger in March 2003. Shortly thereafter, claimant began experiencing additional problems in his hand, including numbness with pain up to his left shoulder. After diagnostic testing was performed, claimant was advised that he had carpal tunnel syndrome and elected to undergo a left carpal tunnel release in October 2003.

The amputation surgery was provided by William O. Reed, Jr., M.D., from the Shawnee Mission Medical Center, with the later carpal tunnel surgery being performed by orthopedic surgeon Neal D. Lintecum, M.D., of Lawrence, Kansas. Claimant's treatment with Dr. Lintecum continued through December 19, 2003, as a follow up to the carpal tunnel and the ring finger amputation. At that time, claimant advised that he was getting along fairly well, with some tingling to the tips of his fingers. He was also experiencing whole arm discomfort on both sides, although Dr. Lintecum was not sure that that condition was related to either claimant's carpal tunnel or the amputation. He did, however, determine that claimant would be in need of additional evaluations as he scheduled claimant for a return check in October of 2004.

Claimant returned to Dr. Lintecum on March 31, 2004, with additional symptoms, including numbness in the hand. Dr. Lintecum considered this to be post-carpal tunnel release and recommended claimant for repeat nerve conduction tests to evaluate the status of the nerve.

Claimant was also referred to orthopedic surgeon Edward J. Prostic, M.D., by claimant's attorney. Dr. Prostic examined claimant on March 22, 2004, diagnosing the finger amputation and the post-carpal tunnel surgery. He found claimant to suffer from both median and ulnar nerve entrapment, with symptoms and signs at the thoracic outlet, cubital tunnel and pronator tunnel. He recommended an additional EMG to evaluate claimant for possible treatment of an entrapment of the ulnar nerve at the elbow.

Claimant last worked for respondent in December of 2003. Shortly thereafter, he obtained employment, performing the same kind of work with Henderson Construction. Claimant testified he worked for Henderson Construction for approximately four months and shortly before the preliminary hearing, transferred to Goss Construction. Goss Construction also involved concrete construction work, with claimant performing the same duties as he had for respondent. Claimant began developing additional symptoms, which caused him to return to Dr. Lintecum on March 31, 2004.

Claimant contends that his symptoms are nothing more than a natural consequence of the original injuries suffered with respondent from both the amputation and the carpal tunnel conditions. Respondent, on the other hand, contends that claimant's employment with Henderson and Goss Construction involved intervening accidents, thereby relieving respondent of the necessity of providing additional medical treatment.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1] The Board will first consider whether it has jurisdiction to review this preliminary hearing Order. The Board has held in the past and continues to hold that it has jurisdiction to review preliminary findings regarding whether injuries are caused by work-related accidents or by intervening events. That issue is tantamount to deciding whether claimant has sustained personal injury by accident arising out of and in the course of employment.[2] The Board, therefore, concludes it has jurisdiction pursuant to K.S.A. 44-534a to consider this matter.

> . . . when a primary injury under the Workmen's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.[3]

However, the Kansas Supreme Court, in *Stockman,*[4] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[1] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

[2] *See Anglemyer v. Woodland Health Center*, No. 265,290, 2001 WL 1399479 (Kan. WCAB Oct. 18, 2001).

[3] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972); *see also Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

[4] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

In *Gillig,*[5] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,[6] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's carpal tunnel condition, while greatly improved, had not completely resolved. When claimant was examined by Dr. Lintecum in December of 2003, he had ongoing symptoms, although they had substantially diminished. The Board acknowledges that claimant returned to work for two separate employers after leaving respondent, performing the same job tasks as claimant performed for respondent. The Board notes that in situations such as this, there is a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, the Board finds by the barest of margins that claimant's condition did arise out of his employment with respondent and is a natural consequence of the original injury with respondent. Therefore, the Board finds that the Order by the Administrative Law Judge granting claimant ongoing medical care for this condition at respondent's expense should be affirmed. As is the normal case at preliminary hearing, the testimony of the examining and treating physicians was not provided. The Board anticipates that this question will be more clearly answered by the health care professionals once their depositions are taken. Hopefully, a more clear picture of the causative aspects of claimant's ongoing symptoms will be available at that time.

As always, findings from a preliminary hearing are subject to review upon a full presentation of the facts and are not binding in a full hearing on the claim.[7]

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[5] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[6] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[7] K.S.A. 44-534a(a).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated July 15, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director